APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16532 September Term 1967 - April Session 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOE EDWIN MILLER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

May 24, 1968

Before Duffy, Senior Circuit Judge, Schnackenberg and Cummings, Circuit Judges.

Duffy, Senior Circuit Judge. Defendant was charged in one count of an indictment with violation of Title 18 U.S.C. Sec. 659, in that he had in his possession three color television sets and two R.C.A. speakers, knowing these chattels had been stolen while they were moving in an interstate shipment of freight and express.

Defendant filed a motion to suppress evidence based on his contention that the TV sets and speakers were seized in an unlawful search and seizure. The District Court denied the motion to suppress. On January 23, 1967, the jury returned a verdict of guilty.

The principal point argued on this appeal is that defendant did not consent to the search freely, knowingly and understandingly.

There is no dispute that on the day following the "hijacking" of a truck hauling goods in interstate commerce, FBI agents Cole, Waldrop, Cauthen and Muollo went to the door of the residence of defendant Miller. Agent Cole

acted as spokesman. When Miller opened the door, Cole identified himself and introduced the other agents. Each agent displayed his identification, Miller invited the agents into his home. They congregated in the living room.

Agent Cole told Miller the FBI had information that Miller had certain TV sets and radio speakers which had been stolen from an interstate shipment. Cole then advised Miller that he need make no statement but that if he did, it could be used against him. Cole also advised Miller that he had a right to talk to an attorney.

Defendant Miller then said——"Yes, I have some TVs and speakers in my garage which I bought from a fellow last night. Do you want to see them? I'll take you back there and show you." The agent said—"O.K." and they followed the defendant to the garage.

As Miller and the agents started toward the garage, they walked through the living room and through a den. Agent Cole said to Miller—"You know, Mr. Miller, you don't have to show us these things. We don't have a search warrant." Defendant Miller said—"Well, if they're stolen, I didn't know they were stolen. I have nothing to hide. You can look around all you want."

The agents did not make a search of the house or the remainder of the premises. While in the garage, they made a note of the serial numbers and models of the TV sets and speakers and ascertained they were among the goods that had been stolen from the truck-trailer.

There was nothing in the conduct of the FBI agents at Miller's home that was, in any manner, coercive. Defendant testified that the agents were very nice, polite and businesslike all of the time they were there.

There was nothing about the search that was unreasonable. As said by the Supreme Court—"The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case." United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

It seems clear that the agents, while in the Miller home, acted in a reasonable manner. Their initial suspicion that defendant had committed a crime was reasonable; their attempt to communicate with a United States Commissioner or the United States Attorney once their suspicion was confirmed, was reasonable. The source of their information had told the agents that Miller was trying to sell the TV sets and radio speakers at 2 o'clock that afternoon. With defendant making attempts to dispose of the stolen merchandise, time was of the esssence.

It is clearly established that no force or deception was used by the FBI agents. The District Court was correct in holding that the consent given by the defendant was voluntarily and intelligently made. United States v. Thompson, 356 F.2d 216, 220 (2 Cir., 1965); Simmons v. Bomar, 349 F.2d 365, 366 (6 Cir., 1965); United States v. Ziemer, 291 F.2d 100, 102-(7 Cir., 1961); cert. den, 368 U.S. 877 (1961); United States v. Jones, 204 F.2d 745, 749-50 (7 Cir., 1953), cert. den. 346 U.S. 854 (1954).

We hold that in this case there was a sufficient warning of defendant's rights under the Fourth Amendment. Cf. United States v. Nikrasch, 367 F.2d 740, 744 (7Cir., 1966).

We further hold that the decision of the District Court that defendant Miller voluntarily and freely consented to the search of his garage, is fully sustained by the evidence. It perhaps should also be noted that the agents did not conduct a search of defendant's home.

The defendant also argues that the trial court unduly prejudiced the jury in favor of the Government by its interrogation of the Government's witness, Michael Lee Bailey. This argument is without merit since the trial court was justified in questioning Bailey regarding his guilty plea entered in this criminal case. While the trial court should not assume the role as trial counsel, it may ask relevant questions of a witness. Since this witness testified that he pleaded guilty to get out of jail, it was proper for the trial court to ask the witness if he wanted his guilty plea set aside. Following the trial court's ques-

tions, defendant's attorney refused to continue cross examination of Bailey. The court suggested that defendant's attorney continue the cross examination. The defendant's attorney said—"The defendant declines to carry on the cross examination, Your Honor." After reading the testimony we conclude that the trial court's questions were asked in the furtherance of ascertaining the truth and were impartial.

We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court.

The judgment of conviction is

AFFIRMED.

APPENDIX B

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 16532

UNITED STATES OF AMERICA,
Plaintiff-Appellee

vs.

JOE EDWIN MILLER,
Defendant-Appellant

Appeal From The United States District Court
For The Southern District of Indiana
Indianapolis Division

The Honorable William E. Steckler, District Judge

APPELLANT'S PETITION FOR REHEARING

The Appellant in the above-captioned matter prays for a rehearing of the above-captioned matter, calling the following matters to the Court's attention and presenting the following grounds:

1. It is respectfully submitted that the Court's opinion in this cause, with respect to the main proposition of law with which it concerns itself, is based upon an incorrect statement of the record. On page 2 of this Court's opinion, it is stated that:

> *There is no dispute* that on the day following the 'hi-jacking' of a truck hauling goods in interstate commerce, FBI agents Cole, Waldrop, Cauthen and Muollo went to the door of the residence of defendant Miller. Agent Cole acted as spokesman. When Miller opened the door, Cole identified himself and introduced the other agents. Each agent displayed his identification. Miller invited the agents into his home. They congregated in the living room.
>
> Agent Cole told Miller the FBI had information that Miller had certain TV sets and radio speakers which had been stolen from an interstate shipment. Cole then advised Miller that he need make no statement but that if he did, it could be used against him. Cole also advised Miller that he had a right to talk to an attorney. (Emphasis supplied)

Page Two of Court's Decision, first two paragraphs. On page 22 of the Appellant's brief, it is shown that there was indeed a dispute on the question of whether the FBI agents who entered the appellant's home introduced themselves as FBI agents before entering, and it was further disputed whether the appellant did invite them into his home as is shown at page 20 of the appellant's brief. Whatever reasons this Court may have had to disregard the aforesaid disputes which were raised by the appellant and to treat them as undisputed matters in its summary of the facts, it is submitted that the said mistake as to facts in issue is sufficient ground for a rehearing in and of itself, The matters raised in paragraph three hereinafter supplement the said ground.

In the light of the said mistake as to fact the appellant would again assert what was asserted at page 145 of his original argument in this matter, that is, that "In the instant case, it would have been a simple matter for the(se) four or five agents to have told the defendant the true nature of their business, criminal investigation, and that the law did not require him to participate in that investigation. These chose, however, to encourage

defendant's abdication (of his rights) by withholding this information from him, no doubt fearing that he would seek counsel and exercise his rights."

If the Court should be inclined for any reason to reject the argument submitted hereinafter in paragraph 3, it also should be noted that even the Appellee's Brief shows that the matter referred to in the first of the two above-quoted paragraphs of this Court's decision was hardly undisputed as the appellant contended that he had believed that the investigating agents were insurance men, not police officers, immediately before he "waived" certain valuable rights. This appears at page 24 of the Appellee's Brief.

2. With respect to the Appellant's attack upon the adequacy of the evidence presented by the government on its case in chief, this Court had only the following to say in its decision:

> We need not dwell on defendant's additional contention that defendant was convicted ". . . upon suspicion and conjecture and nothing more." Possibly such a claim might be considered permissible as an argument to a jury where wide latitude is given. However, in view of the undisputed evidence on this trial, it is absurd to make such an argument to this Court.
> Page Four of Court's Decision, last paragraph.

This amounted to a mere paraphrasing of the government's cursory reply on this point which appeared at page 30 of its brief:

> The defendant's other argument, that the jury convicted the defendant "upon suspicion and conjecture and nothing more", is simply absurd.
> Appellee's Brief, page 30.

The appellant respectfully urges that it is not "absurd" and that it does not constitute a "jury argument" to raise the question of sufficiency of evidence on appeal, even where it is evident that the jury heard a prima facie case.

Where a motion to suppress is at issue it is almost mandatory to do so because this Court, under Rule 52 of the Federal Rules of Criminal Procedure, will not reverse for harmless error. Where it is urged that certain evidence admitted at the trial was not legal evidence, it is more than appropriate to show further that there was not sufficient legal evidence to convict the appellant. To the extent that the legality of the evidence which the appellant sought to suppress in this cause must be reconsidered, the question of sufficiency likewise must be reconsidered.

3. Appellant's counsel is concerned that the number of pages in the appellant's argument caused this Court to decline to give consideration to the said argument. Counsel's concern is caused by the fact that the Court called the number of pages in the written argument to his attention in severe and vehement terms during the oral argument in this cause and by the fact that the opinion in this cause constitutes little more than a reiteration of the rationale expressed in the government's brief in this cause. On this point the appellant calls this Court's attention to page 32 of the appellant's brief and page 26 of the government's brief. These pages are selected for comparison because neither of them are broken up by indented quotes or headings and both are identical in format. Page 32 of the appellant's brief contains exactly 163 words while page 26 of the government's brief contains exactly 333 words, more than twice the number of words appearing on the comparable page of the appellant's brief. The Court's attention is further called to the fact that the appellant's brief consists of reproduced typing while the government's brief was prepared by the more expensive method, that of printing. Both briefs were consistent with the provisions of Rule 16 (f) and (g) of this Court, which said sections of Rule 16 read as follows:

> f. It shall not be necessary to print the record on appeal or on review. All appendices, briefs, or other papers printed for the use of the court, if produced by ordinary typographic methods, must be in such

form and size that they can be conveniently bound together so as to make an ordinary octave volume having pages 6⅛ x 9¼ inches and type matter 4 1/6 inches by 7 1/6 inches, except that appendices and briefs in patent cases may be printed in such size as is necessary to utilize copies of patent documents: viz., 7½ by 10 inches. They and all parts thereof, including index, list of authorities, footnotes and all quotations contained therein, and the matter appearing on the covers, must be printed in clear type adequately leaded; and the paper must be opaque and unglazed.

g. In lieu of submitting a printed appendix or brief as prescribed by Rule 16 (a) and (f), a party may, at his option, reproduce the appendix or his brief or both by multigraph, or offset duplicating method. The record and brief so produced shall be on opaque unglazed paper, size 7½ by 10 inches, with margins of at least 1 inch, except that the left-hand margin shall be 1½ inches. No volume shall contain more than 300 pages. Each volume shall be neatly stitched on the left-hand side and have a cover on both front and back. Type matter shall be double-spaced except for quotations, which may be single-spaced and indented. The clerk shall refuse to accept for filing any copies which are not clear and readable.

The government's brief was consistent with, while the appellant's brief was not consistent with, the provisions of Rule 17 (d) of this Court which reads as follows:

d. Unless permission is obtained from the court or a member thereof, the clerk will not receive a brief of either party of more than 75 pages. The parties shall be referred to as "plaintiff" and "defendant."

The appellant believes it to be self-evident that Rule 16 (g) of this Court was adopted for the purpose of providing appellants of less than average means who are not paupers with the opportunity to present their appeals to this Court the same as appellants of average or better

than average means. The necessity for this alternate means of publishing a brief is readily apparent in view of the decision of the United States Supreme Court in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. But the rules of this Court, by limiting both types of brief to the same number of pages and requiring that all typing except quotes be double-spaced, require any appellant who would seek to have his brief published by the cheaper method to limit his argument to half the length of the argument which could be presented by a more prosperous appellant. These rules further limit a criminal appellant's argument to half the length of the government's argument unless the criminal appellant can afford to have his argument printed by the more expensive method as all government briefs are printed by the more expensive method regardless of the format of a criminal appellant's brief. The Appellant recognizes that the equal protection clause of the United States Constitution upon which the Supreme Court's decision in Griffin v. Illinois is based applies only to the states and not to the federal government, but it is submitted that the Ninth Amendment to the United States Constitution which provides that "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" taken together with a reading of the Constitution as a whole which shows no inclination to permit greater federal discretion in matters affecting the rights of individuals than is afforded to the states compels the conclusion that the federal government, including its courts, is as much obligated to provide equal protection to criminal defendants of different economic means as the states. In recognition of this, much has been done by the federal judiciary and by Congress to protect pauper defendants from being deprived of their rights by their impecunious state, but little or no heed has been given to the problems of those who, while

they are not paupers, necessarily must economize in undertaking an appeal. Rule 16 (g) of this Court, insofar as it provides an alternate and cheaper form for publishing a brief in an appeal to this Court, does pay heed to the said problem but insofar as the rule when taken in conjunction with Rule 17 (d) requires the user of the alternate form to forego one-half of his presentation, the said rules are unconscionable. For this reason, it is respectfully urged that this appeal should be reconsidered and the appellant's brief taken into consideration notwithstanding its length.

Wherefore, Appellant prays for a rehearing in this cause, for reversal of the judgment in the trial court below and for all further relief to which this Court may deem him to be entitled.

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William C. Erbecker
Attorney for Appellant

APPENDIX B-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16532 SEPTEMBER TERM 1967 — APRIL SESSION 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee
vs.
JOE EDWIN MILLER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

JUNE 26, 1968

Appellant's Petition For Rehearing is denied.

/s/ Cummings, J.
Cummings, J.

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